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## A CLASSIFICATION OF PUBLIC UTILITIES—AS AFFECTED BY *NEBBIA* v. NEW YORK

The accepted phrase for defining a public utility is "affected with a public interest". This has been much criticized as being vague;<sup>1</sup> but a vague terminology is probably more desirable than a precise and exact one, as it leaves room for growth and expansion. Our choice should not be limited to the extremes, and it is hoped that by means of a classification a more satisfactory test may be reached.

The determination of the public utility status is a constitutional question, involving, as it does, the due process clause of the Fourteenth Amendment; and so the most, if not the only, authoritative material is the language and holdings of the United States Supreme Court. Beginning with *Munn v. Illinois*,<sup>2</sup> there is an important series of cases dealing with this problem.<sup>3</sup> They have all followed the general doctrine that a public utility must be a business affected with a public interest, but their interpretations of this phrase are conflicting. They may be broadly divided into the liberal and the conservative views. After twenty years of conservative dominance, *Nebbia v. New York*<sup>4</sup> has provided much needed strength for the liberal view, leaving the law in such a state that neither is controlling.

The most obvious thing about the conservative view is that its chief argument and support is a reference to the past. A certain business is private because it has always been private and is just like other businesses which have always been private.<sup>5</sup> The liberal view looks at each particular case with the thought of public welfare uppermost. These views seem permanently irreconcilable, and probably are; but it is hoped that a classification made with a particular emphasis upon them will help to clarify the situation.

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<sup>1</sup> See *Tyson & Bro. v. Banton*, 273 U. S. 418, 430 (1927).

<sup>2</sup> 294 U. S. 113 (1876).

<sup>3</sup> *Munn v. Ill.*, 94 U. S. 113 (1876); *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1914); *Wolff Packing Co. v. Industrial Ct.*, 262 U. S. 522 (1923); *Tyson & Bro. v. Banton*, 273 U. S. 418 (1927); *Ribnick v. McBride*, 277 U. S. 350 (1928); *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929); *New State Ice Co. v. Liebman*, 285 U. S. 262 (1932); *Nebbia v. N. Y.*, 291 U. S. 502 (1934).

<sup>4</sup> 291 U. S. 502 (1934).

<sup>5</sup> See *Ribnick v. McBride*, 277 U. S. 350, 357 (1928).

One distinction has been made between public utilities and private businesses which is much more definite than "affected with a public interest". It is this: a public utility is under the obligation to serve all, but a private business may serve whom it pleases.<sup>6</sup> This distinction has been adopted by the conservatives. In the dissenting opinion to the *German Alliance Insurance Co. v. Lewis*,<sup>7</sup> Mr. Justice Lamar said:

"If the company has the discretion to insure or the right to refuse to insure, then by the very definition of the terms, it is not a public business."

In *Tyson & Bro. v. Banton*,<sup>8</sup> the Court did not say it as clearly but there is no difficulty at all in interpreting it. In attempting to define the necessary public interest it said:

"Nor is the interest meant such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting a 'right', that synonym more nearly than any other expresses the sense in which it is to be understood."

This "right" can only be the right to demand and receive service, and so the obligation upon the business to serve all. The statement that it has not always been so narrowly limited is obviously referring to the insurance case decision, which does not fall within the definition. The same statement is quoted with approval in *Ribnick v. McBride*.<sup>9</sup> Logically, this is a result of the public utility status rather than a reason for it, but if it is a necessary result, it is quite useful in determining that status. If price regulation of the insurance business makes it a public utility and making it a public utility imposes the obligation to serve all, there should be great hesitation about imposing the price regulation. There are two ways of escaping this result—either price regulation does not make a business a public utility or all public utilities do not have to serve all.

If all public utilities are not under the obligation to serve all, a starting point for a classification is provided. The first step is a division into two classes. Those in the first are under the obligation to serve all and those in the second are not. The first class is much the larger and subject to further division. It

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\* 1 Wyman, Public Service Corporations (1911) 2, Sec. 1.

† 233 U. S. 389, 429 (1914).

• 273 U. S. 418, 430 (1927).

• 277 U. S. 350, 355 (1928).

is suggested that there should be three subdivisions: (1) the historical public callings which have survived to the present time, (2) those operating under a governmental franchise, and (3) extensions of the historical public utilities.

The first subdivision includes common carriers, inns, ferries, wharfs,<sup>10</sup> and grist mills.<sup>11</sup> The very name—historical—precludes any extension. The modern common carriers are not extensions, because it is not the mechanism but the function which gives them their places as public utilities.

The second subdivision includes gas, electricity, water, telephone, and telegraph companies. The common carriers could also be placed here, as there is a certain amount of overlapping. The fact that the government grants franchises and privileges to these businesses does not make them public, because there cannot be any grant unless they are public. They are all, more or less, monopolies because they are more efficient that way. This subdivision is open to extension. The extension should not have to include only indispensable things, because the businesses in this class have not always been as necessary as they are now. At first they were luxuries and they may still be looked upon as such. It is probable that extension may come not immediately from private businesses but from those in the second class, those not under the obligation to serve all. Gas companies were recognized as public before the courts imposed upon them the obligation to serve all.<sup>12</sup>

The third subdivision includes such businesses as grain elevators,<sup>13</sup> stockyards,<sup>14</sup> and cotton gins.<sup>15</sup> They were not public in the beginning but have come to be so because of public necessity and analogy to the historical public utilities. The public necessity seems to be closely related to monopoly and the welfare of a particular state or section of the country.

<sup>10</sup> 1 Wyman, *op. cit.*, *supra* note 6, at 18, Sec. 21.

<sup>11</sup> 1 Wyman, *op. cit.*, *supra* note 6, at 11, Sec. 12.

<sup>12</sup> *The Paterson Gas Light Co. v. Brady*, 27 N. J. L. 245, 72 Am. Dec. 370 (1858).

<sup>13</sup> *Munn v. Ill.*, 94 U. S. 113 (1876); *Budd v. N. Y.*, 143 U. S. 517 (1892); *Brass v. North Dakota*, 153 U. S. 39 (1894).

<sup>14</sup> *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (1901); *Ratcliff v. Wichita Union Stockyards Co.*, 74 Kans. 1, 86 Pac. 159 (1906).

<sup>15</sup> *Chickasha Cotton Oil Co. v. Cotton County Gin Co.*, 40 F. (2d) 846 (C. C. A. 10th, 1930); *Tallassee Oil and Fertilizer Co. v. Holloway*, 200 Ala. 492, 76 So. 434 (1917).

This alone in the liberal view would be sufficient<sup>16</sup> for holding the business public, but the conservative view requires an analogy, also. Analogy and nothing else should never be sufficient. It is interesting to note that, when public utilities began to branch out from the historical public callings, they were all called common carriers.<sup>17</sup> This third subdivision is not recognized by the ultra-conservatives, who think that no others should be added to those public utilities already existing.<sup>18</sup>

The second class, those businesses not obligated to serve all, as yet contains only two businesses, insurance<sup>19</sup> and under certain circumstances, milk dealers.<sup>20</sup> They are the only businesses not dependent upon a government franchise or not analogous to historic public callings to which price regulation has been extended. Before the milk case the insurance case was considered an anomaly in the law of price fixing,<sup>21</sup> but now that we have the milk case there is more possibility of extension in this class. The whole matter is in a most unpredictable state, but there is the general conservative tendency to hold the business private and the general liberal tendency to follow the legislature in holding it public. The personnel of the Supreme Court seems to be the most important single factor. There are others which are more or less controlling: the helplessness of the parties being protected,<sup>22</sup> relation to public health,<sup>23</sup> relation to public credit,<sup>24</sup> failure of competition. Mr. Justice Stone's

<sup>16</sup> See *Chickasha Cotton Oil Co. v. Cotton County Gin Co.*, 40 F. (2d) 846, 849 (C. C. A. 10th, 1930).

<sup>17</sup> 1 Wyman, *op cit.*, *supra* note 6, at 18, Sec. 21.

<sup>18</sup> *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 425 (1914) (Dissenting opinion).

<sup>19</sup> *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389 (1913); *McCarter v. Fireman's Ins. Co.*, 74 N. J. Eq. 247, 73 Atl. 80 (1909).

<sup>20</sup> *Nebbia v. N. Y.*, 291 U. S. 502 (1934).

<sup>21</sup> Walton H. Hamilton, *Affection With a Public Interest* (1930), 39 Yale L. J. 1089, 1098-1099.

<sup>22</sup> "We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing." J. Stone, dissenting opinion, *Ribnick v. McBride*, 277 U. S. 350, 361 (1928).

<sup>23</sup> "The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product." J. Brandeis, dissent, *New State Ice Co. v. Liebman*, 285 U. S. 262, 287 (1932); "Milk is an essential item of diet." *Nebbia v. N. Y.*, 291 U. S. 502, 516 (1934).

<sup>24</sup> "On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise." *Germ. All. Ins. Co. v. Lewis*, 233 U. S. 389, 414 (1914).

statement about competition in his dissent to the *Tyson* case,<sup>25</sup> restated almost word for word in the dissent to the *Ribnick* case,<sup>26</sup> is broad enough to include the *Nebbia* case and may be taken as authority in the liberal view:

"An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community."

These are largely only generalities and probably not much more satisfactory as tests than the phrase, "affected with a public interest".

Should there be a class of public utilities not obligated to serve all? Would it not be better to preserve what unity and symmetrical form there is in the public utility law? The *Nebbia* case would still be decided the same way. Mr. Justice Roberts recognized that there was such a form and that the dairy business was "not, in the accepted sense of the phrase, a public utility."<sup>27</sup> The fact that Wyman considered that there was a unity<sup>28</sup> should not necessarily have much weight thirty years later; but if it would make the law simpler and not affect the substance, that would be an advantage. This involves some discussion of police power. There is a difference of opinion as to whether the power to regulate businesses as public utilities is a part of police power or a separate power.<sup>29</sup> The writer thinks that police power is the larger, of which the public utility power is only a part, and that all the regulations imposed upon businesses because they are public come within the police power. Those businesses which do not possess the obligation to serve all should be regarded as being regulated because of the public welfare of police power rather than because of the public interest

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<sup>25</sup> 273 U. S. 418, 438 (1927).

<sup>26</sup> 277 U. S. 350, 360 (1928).

<sup>27</sup> *Nebbia v. N. Y.*, 291 U. S. 502, 531 (1934).

<sup>28</sup> 1 Wyman, *op. cit.*, *supra*, note 6, 32, at Sec. 39.

<sup>29</sup> Willoughby, *Constitutional Law of the United States* (2nd Student's Ed., 1930), 752; 2 Cooley, *Constitutional Limitations* (8th Ed., 1927), 1300, Chapter XVI, "The Police Power of the States"; Burdick, *The American Constitution* (1922) 568, Chapter XXXII, "Due Process and the Police Power"; Freund, *The Police Power* (1904) 380, Chapter XVIII, "Business Affected With a Public Interest".

of public utilities. This is one interpretation of the *Nebbia* case. Mr. Justice Roberts, in discussing the *Munn* case, says:

"Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."<sup>30</sup>

Preserving the form of the law should be the very last thing to be considered, but in this case it seems to have a lot to do with the confusion of the whole subject. The commonly accepted public utilities have to serve all, without discrimination, at a reasonable price, and with adequate facilities.<sup>31</sup> It does not follow that the imposition of one of these obligations—service at a reasonable price—necessitates the imposition of the other three, or that there can be price regulation of public utilities only. The two businesses in the second class have been subjected to price regulation alone. Would it not greatly lessen the confusion to say that price regulation alone has nothing to do with a business' being a public utility but comes under the police power altogether? It is understood that there would still be the same difference of opinion as exists now under the conservative and liberal views. The conservatives consider affection with a public interest the only test for price fixing<sup>32</sup> and they have a very definite opinion of its interpretation. On the other hand, Mr. Justice Holmes thinks that police power is not broad enough.<sup>33</sup>

In summary, public utilities under the obligation to serve all are divided into three classes: (1) the historical public callings accepted at the present time, (2) those operating under a government franchise, and (3) analogies to the historical which were private to begin with and in addition to the analogy have a close relation to the public. Businesses which do not fall into these classes are not under an obligation to serve all; and whatever regulation they are subjected to, even price regulation, must come only under the police power. Thus *Nebbia v. New York* is not

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<sup>30</sup> *Nebbia v. N. Y.*, 291 U. S. 502, 533 (1934).

<sup>31</sup> 1 Wyman, *op. cit.*, *supra* note 6, at 32, Sec. 39.

<sup>32</sup> "By repeated decisions of this Court, . . . that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities . . . must be measured." *Williams v. Standard Oil Co.*, 278 U. S. 235, 239 (1929).

<sup>33</sup> "But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change." *Tyson & Bro. v. Banton*, 273 U. S. 418, 446 (1927).

a public utility case. It is submitted that its effect upon a classification of public utilities is to narrow that classification and provide in the police power a much broader basis for price regulation.

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